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OCTOBER TERM, 1995

DOUGLASS G. LUNDMAN, as trustee for the next of kin of IAN DOUGLASS LUNDMAN, deceased,
Cross-Petitioner,
v.
THE FIRST CHURCH OF CHRIST, SCIENTIST and JAMES VAN HORN,
Cross-Respondents.

On Petition for a Writ of Certiorari to the Minnesota Court of Appeals

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MEMORANDUM IN OPPOSITION TO THE CROSS-PETITION

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MEMORANDUM IN OPPOSITION TO THE CROSS-PETITION

In a Minnesota trial court, Cross-Petitioner Douglass Lundman, as trustee for the estate of his deceased son Ian Lundman, won compensatory wrongful death damages totaling $1.5 million against several Christian Science defendants, including the cross-respondents, The First Church of Christ, Scientist ("The First Church"), located in Boston, and James Van Horn, the one-person Christian Science Committee on Publication for Minnesota. The cross-petitioner also won $9 million in punitive damages against The First Church.

The Minnesota Court of Appeals upheld only compensatory damages, and only as against four defendants other

than those who are now cross-respondents. In reviewing the issue of compensatory liability, the Minnesota Court of Appeals first considered important questions under the First Amendment and Due Process Clause and resolved those questions against the four defendants. It then applied the Minnesota common law of tort and decided the issue of compensatory liability against them under that law. These four defendants, whose compensatory liability was thereby sustained on appeal, were the persons closest to the scene during the Christian Science care that ultimately failed to save Ian Lundman's life. After the Minnesota Supreme Court denied review as to the entire case, Pet. App. 126a,[1] the four filed the principal Petition, raising issues of federal constitutional law that merit review in this Court.

Cross-petitioner has not opposed the principal Petition, which raises questions relevant only to the compensatory liability of the four petitioners. Those questions do not bear upon either the punitive damages award against The First Church, which was reversed by the Court of Appeals, or upon the compensatory liability of both cross-respondents, who successfully challenged the compensatory judgments against them on appeal.

Cross-petitioner's stratagem is thus to hope that this Court will grant the principal Petition and sweep up for review, along with it, the parts of the case cross-petitioner lost in the Court of Appeals. But there is no hope for that stratagem because, unlike the principal Petition, the Cross-Petition does not begin to satisfy elementary jurisdictional requirements of this Court. There is no jurisdiction over the Cross-Petition because, as against the cross-respondents, the judgment below "clearly and expressly" rests upon "independent" state law grounds that are "ade-

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[1] References to "Pet." and "Pet. App." are to the principal Petition filed in this case (No. 95-355, filed September 29, 1995) and to its Appendix, respectively. References to "Cross-Pet." are to the Cross-Petition.

quate" to sustain it, wholly apart from any issues of federal law cross-petitioner purports to present. *Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983). In addition, the Question Presented by the Cross-Petition was neither raised nor considered in Minnesota's courts—yet another jurisdictional bar to review here.

I. INDEPENDENT AND ADEQUATE STATE GROUNDS BAR THIS COURT FROM REVIEWING THE QUESTION PRESENTED BY THE CROSS-PETITION.

Where a state law ground of decision is independent of federal law and adequate to support a judgment, this Court's "jurisdiction fails." *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210 (1935). That failure of jurisdiction is rooted in Article III's prohibition of advisory opinions:

> [O]ur power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Herb v. *Pitcairn*, 324 U.S. 117, 126 (1945). This Court has consistently obeyed that limitation on its jurisdiction, following the rule that "[i]f the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Michigan* v. *Long*, *supra*, 463 U.S. at 1041.

A. The Independent and Adequate State Law Ground for the Judgment Below as to Cross-Respondent Van Horn.

The Minnesota Court of Appeals reversed the compensatory damages verdict as to Van Horn because, as a matter of Minnesota common law, he was not liable for the death of Ian Lundman. Van Horn had no legal "duty" to Ian, given the remote relationship he had to

Ian's care. The Minnesota court held that Van Horn's "mere knowledge of [Ian's] illness" was insufficient under Minnesota's law to impose a duty of care upon him. Pet. App. 39a-40a. In so ruling, the Minnesota court cited only Minnesota case law. *Id.* Consistently, the dissenting judge, although reading the tort law of "duty" differently as applied to Van Horn, also relied upon only Minnesota law. *Id.* 60a-63a.

B. The Independent and Adequate State Law Grounds for the Judgment Below as to The First Church.

1. *Compensatory Damages*

The Minnesota Court of Appeals held that The First Church had no liability for compensatory damages either for its own conduct or, under the Minnesota law of "agency," for the conduct of others. The court found "no evidence" that The First Church "directly interfered in Ian's care," a conclusion cross-petitioner does not contest. Pet. App. 22a. The court also found "insufficient evidence as a matter of [Minnesota] law" of any relationship of control between The First Church and those who did care for Ian that otherwise could support a verdict against the Church as a principal. *Id.* In reaching this holding, the Minnesota court again cited, and relied upon, only Minnesota cases construing Minnesota law. *Id.* 43a-44a.

Cross-petitioner's attempt to argue that The First Church was sufficiently engaged with Ian's caregivers to make them the Church's agents for liability purposes is no more than an argument about what facts the record discloses and what facts Minnesota law makes relevant and sufficient to sustain "agency" findings. Even if those issues presented questions of significance beyond this case, they could not justify review in this Court. They are factual questions tightly wrapped in state law.

2. *Punitive Damages.*

As a first ground for reversing the punitive damages verdict against The First Church, the Minnesota Court concluded, as it did with respect to compensatory damages, that the Church had not, either directly or through agents, interfered in Ian's case. "Hence, there is no past conduct by the church of the kind justifying punitive damages. The punitive damage award must be reversed on that ground alone." Pet. App. 22a.

As a second independent and adequate state law ground for its punitive damages decision, the Minnesota court, without a dissenting voice, held that any such award against The First Church would violate Minnesota's punitive damages statute, Minn. Stat. § 549.20 subd. 1 (1992), and Minnesota case law interpreting it. Pet. App. 24a. The court observed that punitive damages cannot be sustained in Minnesota unless, pursuant to the statute, the record contains "clear and convincing evidence" of a "conscious or intentional disregard" of a "high probability of injury" by the defendant. *Id.* But, noting that it was "unchallenged that all defendants, including the church, acted in good faith," *id.* 25a, the Minnesota court reaffirmed that, under Minnesota law, "[g]ood faith is a proper defense to punitive damages, even though defendants might have been mistaken in their belief that a party was in jeopardy or that their actions were correct." *Peterson* v. *Sorlien*, 299 N.W.2d 123, 129 (Minn. 1980), *cert. denied*, 450 U.S. 1031 (1981).[2]

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[2] The only record evidence of any connection between The First Church in Boston and Ian Lundman's treatment in Minnesota was a single phone call from Van Horn to a person at The First Church in Boston that included word that Van Horn had received a phone call from an unnamed Christian Science parent who was using spiritual care to treat a child's illness. Pet. App. 25a. But such knowledge alone, the Minnesota court held, is insufficient either to sustain damages against Van Horn or against The First Church. *Id.* 25a, 40a. In addition, observing that The First Church teaches its members to obey all laws, the Court of Appeals also noted that

Finally, as a third "independent" ground for reversing punitive damages against The First Church, the Minnesota Court of Appeals determined that even if the record had justified a finding that Ian's caregivers were "agents" of the Church under Minnesota law, and even if Minnesota's punitive damages statute had been satisfied, a punitive award still could not stand: the cross-petitioner expressly had sought a punitive recovery to deter The First Church from *espousing* spiritual treatment and from failing to train its practitioners to perform or seek medical diagnosis. Pet. App. 22a-24a. That argument, the Minnesota court held, unconstitutionally treads upon the First Amendment freedom of churches to decide what matters of faith and doctrine they will *espouse*. *Id.* There is a phalanx of support for that result under the First Amendment. See, *e.g.*, *Thomas* v. *Review Board*, 450 U.S. 707, 713 (1981); *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976); *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94 (1952). But even if there were no such monolith of support in the law, the decision reversing the punitive judgment against The First Church is immune from review in this Court because the first two grounds for that decision are, in the Minnesota court's own words, "independent" grounds for its judgment and plainly adequate to support it. Pet. App. 22a, 24a.[3]

The First Church lacked the "malice required under Minnesota law for the imposition of punitive damages." *Id.* 25a.

[3] Undaunted by the express determination below that the three grounds of decision are "independent" of each other, cross-petitioner stretches in desperation for a basis to refute that. He looks to what he calls the court's "official syllabus." Cross-Pet. 10. But Minnesota's syllabus has no special status and is not "official" in the way that Ohio's is. See *Beck* v. *Ohio*, 379 U.S. 89, 93 n.2 (1964). This Court gives a syllabus no more weight than a state's own courts do, *Old Colony Trust Co.* v. *Omaha*, 230 U.S. 100, 116 (1913), and, like the petitioner in *Minnesota* v. *National Tea Co.*, the cross-petitioner has "not referred [this Court] to any Minnesota authority which, as in some states, makes the syllabi the law of the case." 309 U.S. 551, 554 (1940) (contrasting Ohio's syllabus

II. THE CROSS-PETITIONER'S FAILURE TO RAISE THE QUESTION PRESENTED BEFORE THE MINNESOTA SUPREME COURT BARS THIS COURT FROM REVIEWING IT.

Although the Cross-Petition is improperly silent on the matter, its Question Presented was not raised in the Minnesota Supreme Court.[4] The cross-petitioner nowhere explains why a question unworthy of mention in the Minnesota Supreme Court is somehow worthy of decision in this one. An "unbroken line of precedent" bars this Court from considering a constitutional question that, although available in the State Supreme Court, was not raised in or actually decided there. *Beck* v. *Washington*, 369 U.S. 541, 553 (1962); *White River Lumber Co.* v. *Arkansas ex rel. Applegate*, 279 U.S. 692, 700 (1929); see also *In re Blodgett*, 510 N.W.2d 910, 912 n.2 (Minn.), *cert. denied*, 115 S. Ct. 146 (1994).[5] The cross-petitioner could have raised the Question Presented in the Minnesota Supreme Court, and there asserted that the Minnesota Court of Appeals' alleged "appellate fact-finding" violated the Establishment Clause. Cross-Pet. i. He chose not to. That choice bars review in this Court.

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rule). Finally, nothing in this syllabus precludes the existence of three independent grounds for decision.

[4] The cross-petitioner's silence disregards Rule 14(h) of this Court's Rules, which required him "to specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts."

[5] "The rule that in cases coming from state courts this Court may review only those issues which were presented to the state court is not discretionary but jurisdictional," because, without being raised in or actually decided by a state court, a constitutional right has not been "specially set up or claimed" within the meaning of 28 U.S.C. § 1257(a). *Amalgamated Food Employees Union* v. *Logan Valley Plaza*, 391 U.S. 308, 313 n.6, 334-36 (1968) (Harlan, J., dissenting on other grounds).

III. ON ITS MERITS, THE CROSS-PETITION IS UNWORTHY OF REVIEW.

Cross-Petitioner is angry at the Minnesota Court of Appeals and describes that court as so biased in favor of religion as to have decided this case by violating the Establishment Clause. So far as one can discern it, the thrust of cross-petitioner's challenge is to what he calls that court's improper "appellate factfinding." Cross-Pet. i. In a transparent attempt to wrap this plainly uncertworthy contention in a constitutional costume, cross-petitioner asserts that the Minnesota court deliberately violated the Establishment Clause by engaging in "religious favoritism" through a "highly selective reading of the record" that "sabotaged the appropriate standard of review" to reach a result "biased in favor of the religious organization over the secular individual." *Id.* 9, 12-13. According to the cross-petitioner, this Court should grant the Cross-Petition along with the principal Petition because: "the Establishment Clause does not permit this skewing of the civil justice system in favor of religious actors." *Id.* 13.

This is an odd argument, sounding more like a procedural claim under the Due Process Clause than the Establishment Clause. Nothing cited under the law of either provision, however, supports such an argument.[6] As importantly, there is nothing in the record to warrant any inference of judicial bias. The court's decision itself is proof enough, for the Minnesota Court of Appeals *affirmed* substantial jury verdicts against four Christian Science defendants on exactly the same ground as it *reversed* the verdicts against the cross-respondents—Minnesota's common law of tort duty. It is absurd to suggest that a Minnesota court that found four Christian

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[6] Moreover, the specific issue that cross-petitioner articulates—whether the Minnesota Court of Appeals applied the proper standard of review in considering the trial record below—is itself a question of Minnesota state law, and nothing more.

Science defendants civilly liable was biased in favor of religion. Pet. App. 39a.

Cross-Petitioner presents a list of "facts" that he claims the Minnesota court ignored, urging this list as evidence of the court's alleged bias. Cross-Pet. 13. This is nothing more than a desperate effort to disguise a state law case as a federal one, by purporting to divine biased motives in state court judges and then by describing their review as unconstitutionally infected by that bias. But that is a claim that could be advanced by anyone who loses a case in a state appellate court, with the plainly unacceptable result that, ultimately, every case becomes a federal case.

If the factual controversy underlying cross-petitioner's list were of the slightest interest to this Court, cross-respondents could and would vigorously contest the cross-petitioner's assertions.[7] But even if all factual disputes were resolved in cross-petitioner's favor, there would remain only the same question of "duty" under Minnesota tort law to be decided on a different set of facts. Again, no issue worthy of this Court's attention would present itself. See Sup. Ct. R. 10.

In any event, the cross-respondent's charge of pro-religion bias on the part of the Minnesota Court of Appeals is particularly ironic in view of the million dollar compensatory verdict that court sustained against four Christian Scientists who, in complete good faith, treated a child's illness as they thought best for him in accord with the tenets of their religion.

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[7] It is telling that cross-petitioner fails to provide a single citation to the trial record to support his list of so-called omitted facts. To take just one example, cross-petitioner makes the preposterous assertion that Van Horn, the one-person Committee on Publication for Christian Science in Minnesota, held himself out as a "medical" advisor! Cross-Pet. 13. As the Court below determined, Van Horn had two distinct responsibilities: (1) to correct public error as to Christian Science and (2) to consult with Christian Scientists as to their legal rights and obligations. Pet. App. 39a.

CONCLUSION

As the cross-petitioner has observed, this case is of "national significance." Cross-Pet. 14. Accordingly, cross-respondents join cross-petitioner in supporting the principal Petition. But the Cross-Petition has no such national import. It presents only factual disputes and independent state grounds for decision and, thus, should be denied.

Respectfully submitted,

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